

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-5023

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

GERALD C. BARTON, individually and
d/b/a Sher-Bar Land Cattle Co., and
d/b/a Sher-Bar Land and Cattle,

Bankrupt,

MRS. ALICE LATTER FANTO,

Plaintiff-Appellant,

-against-

GERALD C. BARTON, et. al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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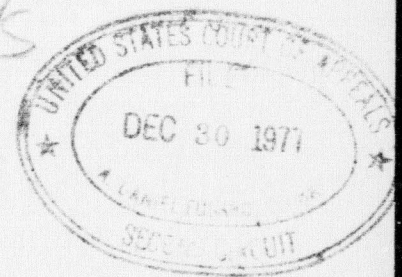


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THE STATUTES

Section 17a (2)(4) of the Bankruptcy Act provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another;

"(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Section 17c (2) of the Bankruptcy Act provides:

"(2) A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision a of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision b of section 14 of this Act and, unless an application is timely filed, the debt shall be discharged. Notwithstanding the preceding sentence no application need be filed for a debt excepted by clause (8) if a right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if either the bankrupt or a creditor submits a signed statement of an intention to do so."

Rule 906 (b) (2) of the Rules of Bankruptcy Procedure provides:

"When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (2) upon application made after the expiration of the specified period permit the act to be done where the failure to act was the result of an excusable neglect; but it may not extend the time for taking any action under Rules 107(b)(2), 115(b)(4) insofar as it makes Rule 50(b) of the Federal Rules of Civil Procedure applicable in bankruptcy cases, 302(e), 403(c), 607, 752(b), 802, 923, and 924, except to the extent and under the conditions stated in them."

Rule 409(a)(2) of the Rules of Bankruptcy Procedure provides:

"(2) Time for Filing Complaint Under Sec. 17(c)2 of the Act; Notice of Time Fixed. The court shall make an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to Sec. 17c(2) of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203(b), the court may fix such time as early as the first date set for the first meeting of creditors. The court shall give creditors at least 30 days' notice of the time so fixed except that only 10 days' notice is required if notice of no dividend is given under Rule 203(b). Such notice shall be given to all creditors in the manner provided in Rule 203. The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph."

STATEMENT OF THE CASE

This is an appeal from an Order by the U. S. District Court for the Southern District of New York (Charles L. Brieant, U.S.D.J.), dated July 18, 1977, affirming the Order of Bankruptcy Judge Howard Schwartzberg, dated March 29, 1977, who denied appellant's motion seeking an Order enlarging time to file a complaint to determine the dischargeability of her claim against the bankrupt, GERALD C. BARTON, under Section 17a(2)(4) of the Bankruptcy Act.

FACTS

GERALD C. BARTON filed a voluntary petition in bankruptcy in the U. S. District Court of the Southern District of New York on March 11, 1976, which matter was referred to Bankruptcy Judge Howard Schwartzberg. Appellant ALICE LATTER FANTO was scheduled as an unsecured general creditor because of a loan extended to the bankrupt.

On March 16, 1976, Bankruptcy Judge Howard Schwartzberg signed an Order pursuant to Section 17c(2) of the Bankruptcy Act, fixing May 10, 1976, as the last date for creditors to file a complaint to determine the dischargeability of debts under Sections 17a(2), (4), or (8) of the Bankruptcy Act, or to object to the total discharge of the bankrupt.

On March 25, 1976, counsel for the bankrupt, EPHRAIM K. LEIBOWITZ, of LEIBOWITZ PLATZER & FINEBERG, met with WALTER SOCOLOW, who was counsel to the law firm of NETTER, DOWD, NESS, ALFIERI & STERN, located at 666 Madison Avenue, New York, New York, attorneys for ALICE LATTER FANTO. Also present at this meeting was EDWARD W. BERMAN, an associate of the firm of Netter, Dowd, Ness, Alfieri & Stern, and the bankrupt, himself.

Following the discussion of the bankruptcy proceedings and appellant's claim, a copy of the petition and schedule of creditors that had been filed with the bankruptcy court were forwarded to Edward W. Berman by Ephraim K. Leibowitz (P. 27 of the Appendix):

ALICE LATTER FANTO obtained new counsel, who filed a motion dated March 15, 1977, returnable on March 23, 1977, to enlarge applicant's time to file a complaint to bar the dischargeability of her claim against the bankrupt under Sec. 17a(2)&(4) of the Bankruptcy Act on or before June 17, 1977. This motion was denied by Bankruptcy Judge Howard Schwartzberg on March 29, 1977, whose order was thereafter affirmed on July 18, 1977, by Hon. Charles L. Brieant of the U. S. District Court for the Southern District of New York.

COUNTER STATEMENT OF THE ISSUE

Has the appellant met her burden of establishing that Bankruptcy Judge Howard Schwartzberg abused his discretion in his Order of March 29, 1977, denying appellant's motion to enlarge her time from May 10, 1976 to June 17, 1977 to file a complaint barring the dischargeability of her claim against the bankrupt under Sections 17a(2) and (4) of the Bankruptcy Act.

Point I

PLAINTIFF'S APPEAL SHOULD BE DIS-
MISSED BECAUSE APPELLANT HAS FAILED
TO SHOW AN ABUSE OF DISCRETION BY THE
COURT BELOW

Bankruptcy Judge Howard Schwartzberg denied appellant's petition to remove the bar date of May 10, 1976 to file a complaint to deny the dischargeability of her claim under Section 17a(2) and (4) of the Bankruptcy Act. The said Court found that appellant failed to establish "excusable neglect" required by Rule 906(b)(2) of the Rules of Bankruptcy Procedure in order to enlarge the time to file a complaint under Section 17a of the Bankruptcy Act after the expiration of the bar date established pursuant to Section 17c(2) of the Bankruptcy Act and Rule 409(a)(2) of the Rules of Bankruptcy Procedure.

Appellant's basis for her motion before the bankruptcy court was that her original attorney's inaction was an excusable neglect under Rule 906(b)(2) of the Rules of Bankruptcy Procedure. Bankruptcy Judge Howard Schwartzberg properly found that: "There is no showing that appellant's

counsel was neglectful, much less that his conduct is excusable."

District Judge Charles L. Brieant affirmed the Order of Bankruptcy Judge Howard Schwartzberg, with the observation that "This change of attorneys, or the fact that the present counsel's appraisal of his client's rights differs from that of the first lawyer, is no basis for a finding of excusable neglect within the meaning of Bankruptcy Rule 906."

Appellant had the burden of showing a reasonable basis for failing to comply with the Order of this Court of March 16, 1976 establishing May 10, 1976 as the bar date. The Court in the Matter of Walter Francis McFarland, 4 C.B.C 77 (W.D. Wisc. 75) stated:

"Rule 906(b)(2), Bankruptcy Rules, provides that the court may permit an act to be done even though the time for its performance has expired if the omission to act within the time prescribed was the result of excusable neglect. The party requesting the extension must show a reasonable basis for his failure to comply within the time specified. Wright and Miller Federal Practice & Procedure: Civil Section 1165 Notes 72 and 73."

Appellant has not met this burden. There is no affidavit from the previous attorneys explaining when they were retained by appellant and what caused them not to file a complaint prior to May 10, 1976. In the second place, there is no affidavit from appellant explaining why it took almost a year from the bar date to seek this relief.

Excusable neglect has been construed by one court as not permitting enlargement of the time to file a complaint to bar the discharge of a bankrupt because of the negligence of the creditor's attorney. The Court in the Matter of Ronald Marvin Starkey, 1 C.B.C. 138 (W.D. Wisc. 1973) stated:

"They hold that the extension will not be granted when the delay could have been prevented by the diligence of the party. Ordinary negligence is not enough."

The Court in the Matter of Ann Walker, 3 C.B.C. 76 (W.D. Wisc. 1974) held that:

"An extension of time to object to discharge should not be granted when the objector, through no fault of the bankrupt, is guilty of unreasonable delay in ascertaining the facts."

Appellant cites the case of Seats vs. Maryland Hotel Supply, 573 F.(2d) 1146 (Fourth Circuit 1976) for the proposition that inaction by an attorney is excusable neglect in extending the time bar of May 10, 1976. The Seats case involved an attorney representing a creditor which attorney failed timely to modify a discharge by an eighteen-day delay. The Court held that the creditor's application will be considered a petition to open a bankruptcy estate and modifying "an order of discharge improvidently brought and unjust in its application."

The above Court stated that the bankrupt, Richard Seats, owed real estate by the entirety with his non-bankrupt spouse. This property owned by the bankrupt "would not and could not pass to the trustee as part of the bankrupt's estate." In exercising its equitable powers, the Court modified the discharge to permit the creditor to continue its suit against the bankrupt and his wife based upon personal guarantees in order to reach the above asset that was not subject to the jurisdiction of the bankruptcy court. This case in no way is applicable to our present proceeding.

The appellant also referred this Court to the case of Gerber vs. Fruchter, 147 F.(2d) 120 (Second Circuit 1945) in support of her position that the Court had "an inherrent power to correct its judgments where the bankrupt's fraud had been put in question." This case involved the discovery of concealed assets some four years after discharge was granted to the bankrupt, Alton Fruchter. The Court denied, however, the vacation of the bankrupt's discharge, "presumably because application was not made within a year, Bankruptcy Act Section 15" However, the Court did open the bankruptcy estate to administer the monies that were concealed. Appellant's position, in the present proceeding, it would appear, is not advanced at all by this case either.

Bankruptcy Judge Bressman, of the U.S. District Court for the Western District of Wisconsin, held in the case of "In Re Roethe", CCH Bankruptcy Law Reports, New Developments, Court Decisions, 66,652, that: "Delay of about eleven months from the bar date of filing a complaint to bar the dischargeability of a creditor's claim by a creditor's attorney did not present a case of excusable neglect under Rule 906(b)."

Point II

RULE 409(a)(2) OF THE RULES OF BANKRUPTCY
PROCEDURE HAS NO RELEVANCY TO EXTEND
APPELLANT'S TIME AFTER THE EXPIRATION DATE
ENDED PREVENTING HER FROM FILING A COMPLAINT
BARRING THE DISCHARGEABILITY OF HER CLAIM.

The appellant urges that Rule 409(a)(2) of the Rules of Bankruptcy Procedure is authority for the bankruptcy court to have exercised its discretion in enlarging her time to file an adversary proceeding. The relevant portion of this Rule provides:

"The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph."

This provision is almost identical to Rule 906(b)(1) which states:

"When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without application or notice order the ~~period~~ enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order..."

Both rules are limited to extensions of time before the expiration date has barred the right of a party to act. On the other hand, Rule 906(b)((2) is the only provision that is relevant, if a party seeks to extend a

time bar after its expiration. In that event, "excusable neglect" is the only standard for the court to follow.

Appellant cited the case of In re Jones 560 F.(2d) 775 (Seventh Circuit 1977) for authority to support her position with Rule 409 as relevant to this case. In this Jones case, however, no objection to a late filing of an adversary proceeding by way of an answer to a complaint was filed by the bankrupt.

The bankruptcy petition in that case was filed on October 15, 1974 and the First Meeting of Creditors was scheduled for November 7, 1974. On December 17, 1974, the bankrupt filed an adversary proceeding to determine the dischargeability of the claim of a creditor, one LaSalle. On January 3, 1975 the creditor in its answer asserted that this claim was non-dischargeable under section 17a(4) of the Bankruptcy Act.

The Seventh Circuit Court of Appeals in the Jones case held that the bankruptcy judge who granted the relief requested by LaSalle had implied a retroactive extension of time to bar the adversary proceeding by LaSalle. In our case, an application was made to enlarge the time of the creditor

that was strongly opposed by the appellee.

The retroactive extension of time implied by the Seventh Circuit Court was within the ninety day period of the First Meeting of Creditors. The bankruptcy court is required by Rule 409(a)(2) to set a date not less than thirty nor more than ninety days for creditors to file adversary proceedings to bar the dischargeability of claims under section 17a(2), (4) and (8) of the Bankruptcy Act. Thus, the implied extension of time in the Jones case was within the ninety days provided by Rule 409(a)(2). Consequently, the case of In re Jones does not support appellant's position.

Wherefore, appellee respectfully requests that the appellant's appeal be denied with costs.

CONCLUSION

The Orders of Bankruptcy Judge Howard Schwartzberg dated March 29, 1977 and District Judge Charles L. Brieant dated July 18, 1977 should be affirmed.

Respectfully submitted,

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Received two copies
12/29/77

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